Central Law Journal.

ST. LOUIS, MO., JUNE 7, 1918.

STATE STATUTE OR CITY ORDINANCE AS EVIDENCE OF NEGLIGENCE UNDER FEDERAL EMPLOYERS' LIABILITY ACT.

In McLain v. Chicago & Gt. Western R. Co., 167 N. W. 349, decided by Supreme Court of Minnesota, it was held that a city ordinance prescribing speed limits within the city for the running of trains was not admissible in evidence for defendant railway in a suit wherein it was claimed that plaintiff, a passenger train engineer, was guilty of contributory negligence. There was dissent by one judge.

The prevailing opinion speaks of the Act of Congress superseding all state laws upon the subject of liability of a carrier in interstate commerce to its employes.

It is said "The act (of Congress) covers the entire field under which the employer in interstate commerce shall be liable for injury to the employes likewise engaged. It pertains solely to the relation of master and servant. It does not supersede state legislation outside of this field, nor does it deal with the duties or obligations of either with the public, but it does supersede all state and municipal legislation governing the circumstances under which the master, while within the provision of the act, shall be liable for injury to the servant. It follows that the ordinance is superseded by the Act of Congress and was not admissible in evidence."

There seems something lacking in persuasiveness to the conclusion just stated. The dissenting opinion, which is very brief, quite strongly suggests the weakness of this reasoning.

Thus the dissent says: "It is the law of the federal jurisdiction that reasonable municipal regulation of the speed of interstate trains is a valid exercise of the police power to which the interstate carrier is obliged to conform." * * * It has also been for a long time the law of the federal jurisdiction that the violation by a carrier of a reasonable speed ordinance is evidence of negligence in the operating of a train. Grand Trunk Ry. Co. v. Ives, 141 U. S. 408. In my opinion the Federal Employers' Liability Act did not change these principles of law. Under that act the federal law is permanent and exclusive in determining what is negligence and contributory negligence. These terms are not defined in the act. * * * Now as before local police regulation which the interstate carrier is bound to obey must be taken into account. Federal law prevails, but this is federal law."

If we take it that the common law is to be applied to the Federal Employers' Liability Act as that is applied by federal decision, yet that common law is to be applied to the circumstances of a transaction. If an ordinance under police power may create a situation which carrier as well as employe is to recognize, why should not such ordinance be evidence to explain an act or acts by a business subject to police power?

Thus suppose an employe in charge of a train, as engineer, is running through a city with no speed ordinance, does it not seem clear, that the conduct of the engineer has a different aspect, than were he violating no ordinance in another city? The situation in the latter city has an element injected into it which does not exist in the other city. It colors his conduct. It amounts, presumptively, to a disobedience of directions on the part of his employer. It is some evidence of negligence and of willfulness as well.

It goes even further than this. It warns the engineer that he will probably encounter

danger ahead, and that he is bound to exercise special care for his own sake and the sake of the public at large. It is not to be presumed, that the ordinance only was looking out for safety of a carrier's employes. The public is interested in all, and it also is interested in the preservation of the property of an interstate utility.

Why is it not true, as the dissent well says, that to take all of those things into account is "federal law?" Federal law is not operating in states in utter disregard of all local rights. It enjoins upon the carrier scrupulous regard for police power there properly declared. Whether disregard by the employe of the special ordinance is negligence *per se*, we do not here discuss. We concede, however, this would be a thing for federal decision to declare. But that the ordinance is not admissible as tending to show contributory negligence seems to us by no means clear.

NOTES OF IMPORTANT DECISIONS.

NEGLIGENCE—SAFEGUARDS FOR CHILDREN AGAINST ATTRACTIVE LURES.—In McLendon v. Hampton Cotton Mills Co., 95 S. E. 781, decided by the Supreme Court of South Carolina, it was held as matter of law, that a four-foot woven wire fence around a reservoir, though easy to climb, was a sufficient safeguard so as not to make company maintaining same responsible for the death of a six and a half year old child climbing the fence and being drowned in the reservoir.

This ruling was by a majority of three to two reversing the judgment finding liability.

The prevailing opinion speaks of normal children for whom such a barrier would be sufficient as a safeguard and those "abnormally mischievous and disobedient." "The landowner," says the court, "is not bound to erect a barrier, which no child can overcome, but only such as is sufficient to safeguard the child of ordinary and normal instincts and training."

The minority opinion does not reason about normal and abnormal children, and very rightly, it seems to us, does not class mischievousness as a sign of abnormality. Entire absence of that would for us tend rather to prove an abnormal child. A lure, if it is a lure, might be an aggravation to childish instincts if not thoroughly guarded against. At all events, it seems to us, that it is more a question of fact as to what is a sufficient safeguard, than a question of law, and we deprecate any rule that recognizes responsibility for maintaining a lure for children and then distinguishes their instincts in the way this court does.

The minority opinion well says that: "If a safeguard, it was because the fence was notice to the child or a hindrance to the child; in no other respect could it be a safeguard. To a child of six years it was no notice at all; the child would not know what the fence was put there for, except perhaps a thing to play upon," and "it was no hindrance; it was rather an invitation to climb." At all events, we have never heard that "*capax doli*" necessarily displaces childish instincts or distinguishes between attractive lures.

STATUTE OF LIMITATIONS—RIGHT OF FEDERAL COURT SITTING IN EQUITY TO DISREGARD.—In Humphreys v. Walsh, 248 Fed. 414, decided by Third Circuit Court of Appeals, the rule of a federal court in equity actions not being bound to apply the doctrine of laches as presented by state statutes of limitation, as applied in cases at law, notwithstanding the time fixed by such statutes has not expired, is extended to cover a case, where such a statute expressly provides an exception to the application thereof.

The court said: "In applying the doctrine of laches in equity actions, it must first be observed that Federal Courts are not bound by statutes of limitations of the former even when they are applicable by their terms to such actions. (Citing Supreme Court cases.) Federal Courts pursue their own rules of equity procedure and enforce the doctrine without regard to, and, in instances, even within the period of an applicable statute of limitations (citing one C. C. A. case). It is not necessary to discuss here the reasons that control Federal Courts in thus broadly enforcing the doctrine. These are briefly and sufficiently given with supporting cases in 10 R. C. L. 395-408. The Supreme Court of the United States has repeatedly stated and fully established the scope of the equitable defense of laches when offered in applicable state statutes of limitations as enforced by Federal Courts. * * * * If the limitation of an applicable

state statute yields to the doctrine of laches as applied by Federal Courts, an exception of a statute saving the right of action, also must yield, for, as in this instance, the exception is not available, when the statute itself falls before a doctrine with which it is in conflict."

In this case plaintiff brought suit on a demand more than thirty years old and more than fifteen years after death of the maker of the note, the operation of which the state statute suspended by exception and saved the right of action during the non-residence of obligors in the situation of this maker. The court held that, though, if plaintiff were suing in law his action would not be barred, yet in Federal Courts by laches he was barred.

Here it would seem was a mandatory provision by statute over a situation the state had the right to legislate about, and yet a Federal Court refuses to apply the statute.

Conceding that the doctrine of laches has been applied as declared, yet it must be admitted that this goes so counter to the principle of Federal Courts respecting state statute law, that the principle ought not to be extended beyond what is absolutely clear.

Besides, it is not altogether clear that the conclusion the Circuit Court of Appeals deduces is certain. Federal Supreme Court was holding along lines of general jurisprudence. It was not intending to go into the very teeth of state law. It was itself considering an exception within a statute raised by the doctrine of laches. It was not refusing to give any force to the statute. In this case the court refused to give state law any consideration at all so far as the exception was concerned.

Furthermore, the Supreme Court has always regarded that well settled decision by states constitutes a rule of property, and positive unequivocal statute ought to be as valid as settled decision. Ought ever a lower Federal Court to extend such a rule as the Supreme Court has declared?

INDIAN COUNTRY—RIGHT OF WAY TO RAILROAD WITHIN.—In U. S. v. Goldana, 38 Sup. Ct. 357, decided by U. S. Supreme Court, it was held, that, as act of Congress creating Crow Indian Reservation and granting to a railroad right of way through the reservation was to work forfeiture of all privileges upon breach of certain conditions, the grant did not extinguish Indian title and only conveyed an easement or a limited fee, leaving such right of way in Indian country and the introducing of intoxicating liquors thereon was an offense under the act forbidding such introduction within the exterior boundaries of such reservation.

The introduction in this case was on the platform of a railroad company, and it was contended that the Indian title on the right of way had been extinguished. The court asked: "Did the statutes except from the reservation the land on which the railroad was built and extinguish the Indian title or did they merely give to the company a right of way or other limited interest in the land on which to construct and operate a railroad?"

It was said: "To have excepted this strip from the reservation would have divided it into two, and would have rendered it much more difficult, if not impossible, to afford that protection which the statutes were designed to secure." A prior case is referred to and distinguished because it involved a statute which extinguished the Indian title. Clairmont v. U. S., 225 U. S. 551.

The difficulty in applying statutes barring introduction of intoxicating liquor into Indian country, by the grant to a railroad of a right of way through a reservation, is readily appreciated and, on general principles, one would suppose, that, even if Indian title were extinguished by a grant from the government through a reservation, it ought not to operate to excuse one selling liquor thereon. But it may be that such a construction might be indulged on the theory that a criminal statute is to be taken in *favorem libertatis*, which view the easement or conditional fee theory is sufficient to displace. This looks though like a "narrow squeak" for holding one charged with crime.

CARRIERS OF LIVE STOCK—CONSTRUCTION OF THE THIRTY-SIX-HOUR STATUTE.—The first case in the Supreme Court on the Act of Congress in 1906, to prevent cruelty to animals while in transit, and which forbids carriers to confine animals in cars longer than thirty-six hours, is that of Chicago & N. W. Ry. Co. v. United States, 38 Sup. Ct. 351, the opinion of which was handed down April 15, 1918. Justice McReynolds wrote the opinion, and very clearly defines what shall and what shall not excuse the carrier for violation of this Act.

In this case the cattle were loaded on cars at Ringsted, Iowa, destined for the Union Stockyards, Chicago. They were loaded at 6 P. M., October 4th, and arrived at Chicago October 6th at 9 A. M., thirty-nine hours and

five minutes after being loaded. There was evidence to show that the usual schedule for freight trains for that distance was less than thirty hours. The delay in this case, however, occurred while the train was passing through the town of Proviso, sixteen miles from Chicago: a drawbar dropped out, derailing one of the cars.

In the lower court the jury found the defendant guilty, and the judgment was confirmed by the Circuit Court of Appeals. In reversing this judgment, Justice McReynolds calls attention to the error of the presiding judge in instructing the jury on the question of due diligence, in which the court defined the term as meaning "whatever ingenuity human intelligence could devise and put in operation, having in mind the practical operation of a railroad, and having in mind the purpose which the law has, to get stock to market within the time mentioned."

Justice McReynolds said

"We find nothing in the Act indicating a purpose to interfere directly with the carrier's discretion in establishing schedules for trains; the design was to fix a limit beyond which animals must not be confined, whatever the schedule, except under the extraordinary circumstances stated. In general, unloading can only take place at specially prepared places or final destination. If in the exercise of ordinary care, prudence and foresight the carrier reasonably expects that following the determined schedule the containing car will reach destination or some unloading place within the prescribed time it properly may be put in transit. Thereafter the duty is on the carrier to exercise the diligence and foresight which prudent men, experienced in such matters, would adopt to prevent accidents and delays and to overcome the effect of any which may happen—with an honest purpose always to secure unloading within the lawful period. If, notwithstanding all this, unloading is actually prevented by storm or accident the reasonable delay must be excused."

In remanding the case back to the trial court for a new trial, Justice McReynolds calls the attention of the trial court to the construction of the Hours of Service Act, which it says is analogous, especially to the decision of the Supreme Court in the case of Atchison, Topeka & Santa Fe Ry. Co. v. United States, 244 U. S. 336, where it was said:

"It was not the intention of the proviso, as we read it, to relieve the carrier from the exercise of diligence to comply with the general provisions of the Act, but only to relieve it from accidents arising from unknown causes which necessarily entailed overtime employment and service. United States v. Dickson, 15 Pet. 141. It is still the duty of the carrier to do all reasonably within its power to limit the hours of service in accordance with the requirements of the law."

REORGANIZATION OF THE JUDICIAL ADMINISTRATION OF JUSTICE*.

The fundamental reform about which there has been but little discussion which in importance overshadows all others, is the improvement in organization of our entire judicial department and our methods of selecting and retiring judges.

This reorganization of our courts can only be accomplished by a complete and consistent scheme, by which the whole judicial power of the state shall be vested in one great court, of which all our judicial tribunals shall be branches, departments or divisions. Until this principle of unified state courts is recognized and carried into effect, all our efforts to secure judicial reform will prove unsatisfactory and disappointing.

The system under which our courts were originally organized may have proven adequate for frontier states, where population was scant and confined to rural districts, where travel and communication was slow and difficult, where commerce and industry were undeveloped and the legal problems were simple and confined to those which naturally arose in an agricultural community where primitive social conditions prevailed. But with the growth of wealth and population, these primitive conditions have long ceased to prevail, and yet we are relying on court organizations, created to meet the simple demands of a frontier state for the solution of many intricate problems, the increased litigation, and the law requirements of a highly complex and advanced civilization.

*This article, by Gov. O'Neal of Alabama, is a remarkably accurate restatement of the principal reforms in the administration of justice now advocated by leaders of the bar and supported by the recommendations of the American Bar Association. It is, in substance, part of an address by Gov. O'Neal at the last meeting of the Alabama Bar Association, which has been revised for the purpose of this article.—Editor.

The organization of our courts remains the same it was in the days following the American revolution and we still continue to adminster justice under rules of practice and procedure adopted and suited to the times of the Tudors and the feudal ages. As our wealth and population increased, as our manufacturing, industrial and commercial interests were developed and expanded, and our villages grew into towns and populous cities, and new and intricate legal problems arose, and the dockets of our courts became crowded and congested with civil and criminal cases, instead of reorganizing our judicial system to meet the new conditions, which modern civilization produced, our legislature simply "spawned out new courts." That the spawn was too prolific we shall later proceed to demonstrate. These new courts were separate and independent administrative units. There was no responsible head of our judicial system, no superintendent clothed with the power to supervise the operation of the different courts, to suggest and secure reforms, or speed the judicial machine to the highest point of efficiency.

Administrative Organization.—Our present system lacks a head. There is no one with authority to act as superintendent, to gather statistics, to inspect judical transactions, to watch the trial cases, and the practical workings of the court, to observe their failure or weakness and to suggest improvements. If there is a miscarriage of justice, due either to the incompetency of the judge, the practice and procedure, the faulty organization of the business side of the court, lack of proper clerical aid, neglect of duty by court officials, and other causes, there is no one clothed with power or authority to make report or criticism, to suggest improvements or prevent the recurrence of similar failures in the administration of the law. An able and earnest law writer was so impressed with this condition, that in the journal of the American Judicature Society, he recently wrote a convincing plea for the creation of a chief judicial superintendent. In California his ideas have been literally indorsed by the proposal to create a commissioner of justice, who would be a judicial superintendent, but without machinery to enforce his recommendations.

The delay as well as the expense in the trial of civil and criminal cases, due largely to our unscientific type of court organization and to rigid rules of practice and procedure formulated by the legislature, instead of by the courts, the thousands of petty, frivolous and unfounded prosecutions in misdemeanor cases, inspired by the fee system, which clog the dockets of our criminal courts, have all become a growing evil and challenge the consideration of the bar and of all who are interested in giving the state a more economical and speedy administration of our civil and criminal laws.

Reforming Jurisdiction and Organization of Courts.—The remedy then for these conditions is the reform of the jurisdiction and organization of our courts. The English Court Reform Act of 1873 is a model of modernized courts. It is, therefore, unnecessary for us to attempt to secure reform of our courts by the introduction of legislation of an experimental nature. As Hon. Henry Upson Sims states in his admirable essay on Reforming Judicial Administration, "the new system of courts created by the English Judicature Act of 1873 not only still works satisfactorily in England, but has been accepted as a model by students of reform and critics of common law institutions all over America as well."

The limits of this address will not permit an adequate summary of the English Judicature Act and I will therefore content myself with quoting the conclusions of a modern critic, Prof. Roscoe Pound, of Harvard, applied as his general recommendations for American adoption, as found in

the article mentioned by Mr. Sims. Prof. Pound says:

"The whole judicial power of each state * * * should be vested in one great court, of which all tribunals should be branches, departments or divisions. * * * This court should be constituted in three chief branches: (1) county courts or municipal courts; (2) a superior court of first instance; (3) and a single ultimate court of appeal. The first should have exclusive jurisdiction over all petty causes. There should not be a separate judge for each locality. Instead, all the courts with petty jurisdiction should in the aggregate constitute one court, or a branch of the great court, but this branch of the court should have numerous local offices where papers may be filed and as many places for hearing causes in each county as the exigencies of business may require. * * *

"The second branch would be a superior court of first instance with a general original jurisdiction at law, in equity, in probate and administration, in guardianship and kindred matters and in divorce. It should also have general jurisdiction. It should have numerous local offices where papers may be filed, and at least one regular place of trial in each county. * * * Some high official of the court should be charged with supervision of the judicial business of the whole court, and he should be responsible for failure to utilize the judicial power of the commonwealth effectively. * * * And the third great branch of the court would be a single court of appeal to which causes must go directly for review upon the law from the county courts or from any division of the superior court. All the judges of the commonwealth should be judges of the whole court."

The plan, then, proposed is simple, is neither academic, experimental or revolutionary It has been in successful operation in England since 1873 and in the unified municipal courts of Chicago, whose business organization secured the utmost economy, efficiency and impartiality in the administration of law in the second largest city in the country. This plan for unification of the judicial system was endorsed by the special committee of the American Bar Association in its report in 1909, the committee being entitled "A special committee to suggest remedies and formulate proposed laws to prevent delay and unnecessary cost in litigation."

The committee says:

"The first principle which the committee desires to submit is that of unification of the judicial system.

I. The whole judicial power of each state, at least for civil causes, should be vested in one great court, of which all tribunals should be branches, departments or divisions. The business as well as the judicial administration of this court should be thoroughly organized so as to prevent not merely waste of judicial power, but all needless clerical work, duplication of papers and records and the like, thus obviating expense to litigants and cost to the public."

In speaking of this plan, the committee says, that while the whole judicial power should be concentrated in one court, the court should be constructed in three branches. First: county courts, including municipal courts, having exclusive jurisdiction of all petty causes, all of them to constitute one branch with numerous local offices where papers may be filed and as many places for hearing causes in each county as the exigencies of business may require. Second: a superior court (our circuit courts,) having a defined original, exclusive, general jurisdiction at law, in equity, in probate and administration, in guardianship, and kindred matters, and in divorce; this court to have numerous local offices where papers may be filed and at least one regular place of trial in each county and to be divided into at least two, and probably three, divisions— (a) one for disposition of actions at law and other matters requiring a jury or of kindred nature; (b) one for equity causes; and; (c) one for probate administration, guardianship and the like. The first might be called the law division or the common pleas division, the second the equity or chancery division, and the third the probate division. The third branch would be a single ultimate court of appeals."

The principle of all these plans has been adopted by the American Judicature So-

ciety, a philanthropic association organized a few years ago to promote the efficient administration of justice. As stated by Mr. Sims in his article on "Reforming Judicial Administration," the society has published so far about a dozen bulletins, consisting of discussions and criticisms of the existing systems of judicial administrations in America, together with recommendations for its reform, and for the aid of legislators, the society has issued several complete model bills to be enacted into laws, where complete reform of the courts is contemplated, prefaced by proposed constitutional amendments necessary in most instances, as the model bills generally conflict with details in existing state constitutions."

Unified Courts.—The basic principle of the reforms proposed by the committee of the American Bar Association, and the American Judicature Society, is the unification of the entire judicial system of the state and the power given the chief justice to marshal all the judicial forces of the state to meet the pressure of business in any branch of the court or in any part of the state. They all contemplate complete and thorough supervision of the business of all the courts by some one in high authority, such as the chief justice, with the power to make reassignments or temporary assignments of judges to particular localities as the state of judicial business, vacancies in office, illness of judges or casualties might require, and with power subject to general rules, to transfer causes or proceedings in any court for hearing or disposition according to the condition of the dockets and to see to it that all the judicial power of the state is effectively utilized. The same general supervision which the chief justice gives to the whole court is exercised by each branch and each division, in each locality by some other officer who is especially charged with the duty and is responsible for the efficient and businesslike conduct of the affairs of the courts under his control and the disposition of causes upon the dockets.

The plan of the American Judicature Society contemplates that the states should be divided into say six or seven circuits, with corps of judges, one circuit judge made chairman for the circuit, with complete power to regulate the assignment of causes to the different courts in his circuit and to designate that judge who might be most fitted for the duty in each branch of the court. Such chairman will also have power to transfer causes from one division of the court to the other. All the plans seek to secure a thorough business administration of the courts and to overcome the decentralizing conditions which now exist, by which the clerks and other officials of each court are practically independent functionaries over whom even the judge of their own courts has but little control. It is important that the legislature should not undertake the formulation of detail rules for the business administration of the courts, but only to lay down general principles and leave it to the court to regulate details and to alter and improve the rules as the problems are met and the best solutions for them ascertained.

Economy From Unified Courts.—There is another consideration of controlling importance in favor of a unified and thoroughly organized system of courts with a simplified practice, and that is the decrease in the number of judges and the expenses of the judicial department. The committee of the American Bar Association summed up the advantages of such an organization of the courts, of judicial business and clerical and administrative work of the courts as follows:

"I. That it would make a real judicial department. The several states, they say, have courts but they do not have any true judicial department."

"II. It would do away with the waste of judicial power involved in our present system of separate courts with hard and fast personnel. Where judges are chosen for and their competency is restricted to rigid districts or circuits or courts, it is a familiar consequence that business may be congested

in one court while judges in another are idle. The judicial department should be so organized that its whole force may be applied to the work in hand for the time being, according to the exigencies of that work."

"III. That it would do away with the bad practice of throwing causes out of court to be begun over again in cases where they are brought or begun in the wrong place. They may be transferred simply and summarily to the proper branch or division or rules may provide that the cause be assigned at the outset to the place and division to which it belongs and no question of jurisdiction will stand in the way."

"IV. It would do away with the great and unnecessary expense involved in the transfer of causes, obviating all necessity of transcripts, bills of exceptions, certificates of evidence and the like, and permitting original files, papers and documents to be used, since each tribunal, as a branch or division of the whole court, may take judicial notice of all files, papers and documents belonging to the court."

"V. It would obviate all technicalities, intricacies and pitfalls of appellate procedure. An appeal would be merely a motion for a new trial, or for modification or vacation of the judgment before another branch of the same court. It would require no greater formality of procedure than any other motion."

"VI. It would do away with the unfortunate innovation upon the common law by which venue is a place where an action must be begun, rather than a place where it is to be tried, so that a mistake therein may defeat an action entirely instead of resulting merely in a change of place of hearing. This innovation is especially unfortunate when it is applied to equity cases where originally there was no venue. If all tribunals are parts of one court, there need be nothing beyond a transfer of the cause. All proceedings up to the date thereof may be saved."

"VII. It would obviate conflicts between judges of co-ordinate jurisdiction, such as unhappily obtain too often in many localities under a completely decentralized system, which depends wholly on the good taste and sense of propriety of individual judges or on the slow process of appeals to prevent such occurrences. * * * As most of our courts are organized at present, there is nothing to prevent any judge from trying any cause pending in the court he pleases, regardless of how foreign it is to the work he and his colleagues have agreed he shall attend to."

"VIII. It would allow judges to become specialists in the disposition of particular classes of litigation. The prevailing system of rotation is unfortunate. Usually where there are a number of judges, they take up in rotation civil trials with juries, equity causes and criminal cases. By keeping a judge continuously occupied in one class of cases, he becomes thoroughly familiar therewith and this specialization was the real advantage of the separate courts of law and equity. INSTEAD OF SEPARATION BETWEEN LAW AND EQUITY IN PROCEDURE, THE DESIRABLE THING IS SEPARATION IN ADMINISTRATION. The way to obtain this is to organize the court in such a way that the judges may be assigned permanently to the work in which they prove most fit."

"IX. It would bring about better supervision and control of the administrative offices connected with judicial administration and make it possible to introduce improved and more businesslike methods of the making of judicial records and clerical work of the courts."

All these plans for the unification and simplification of the organization of our courts could only be put in operation by amendments to the present constitution.

Judicial Council.—Another novel feature of the plan is the creation of what is termed the judicial council. This council is to be composed of the chief justice, the presiding justices of each of the several divisions of the superior or circuit courts and the presiding justices of the county courts, if he be other than the chief justice, but if not, then a county judge to be appointed by the chief justice in writing, one justice of the court of appeals and one judge of the general court of judicature, to be appointed by the chief justice. This judicial council is entrusted with very large and important powers. They can reduce or add to the number of judges of any division of the superior or circuit court, provided they do not exceed the number of judges provided by law, and provided that the reduction of

the number of judges can only be effected when a vacancy occurs.

This council is intrusted with the power to make, alter and amend all the rules of pleading, practice and procedure in all the courts of the state, including district magistrates. They have power to regulate the duties of the officers of every court and the cost of proceedings therein. They are vested with the power to make rules and regulations respecting the conduct of the business of the clerk for the general court of judicature and the jury commissioners and prescribe the duties of the clerk and jury commissioners and their subordinates and to regulate the sittings of the court of appeals and all other courts of the state. The act provides that all the pleading, practice and procedure in every court shall be repealed as statutes, but declared to be operative as rules of court for the general court of judicature, but subject to the power of the court and the judicial council thereof, to make, alter and amend the rules regulating practice, pleading and procedure in said court. Under this plan, there would be one chief clerk of all the courts in the state, located at the capital, to be appointed by a majority of the judicial council, and to hold office at their pleasure.

The office of register and master in chancery would be abolished upon the expiration of terms of those holding office. Masters would be eligible to sit in any court or to discharge any judicial function which the judicial council might authorize, and until such action, the duties of the master would be those now required by law. Another novel provision is that the masters would be subject to assignment to any other division of the circuit or superior courts by the chief justice, in his discretion.

As stated by the American Judicature Society, the purposes of their plan is to secure administrative authority, co-operation and coherence of effort. They state "that the spirit of co-operation, and the esprit de corps, of the entire judiciary is fostered by an annual convention of judges, at which the judges meet as a whole to receive the report of the chief justice and at which meeting they can sit and recommend all such rules and regulations for the proper administration of justice in their courts as may seem expedient and to consider all complaints with reference to their courts and the officers thereof or consider such other matters in reference to the administration of justice as the chief justice may bring before them." In view of his large duties, powers and responsibilities, the chief justice is given a salary of fifteen thousand dollars per year. The fee system, wherever it exists, is abolished and all the fees now paid to registers in chancery, clerks and probate judges are collected and turned into the state or county treasury. It has been estimated that the adoption of this plan in Alabama would reduce the expenses of the judiciary more than one-half and would moreover prevent any waste of judicial power and secure more speedy, vigorous, inexpensive, and efficient enforcement of the law.

Simplification of Procedure.—One of the most important reforms which all these plans contemplate is the simplification of pleading, practice and procedure. The ability of our courts to dispense justice speedily, and economically, has been largely lessened by legislative action. Questions of procedure, involving no substantial rights, are peculiarly within the expert knowledge of the judges and belong to judicial, rather than to the legislative branch of the government. There are many eminent authorities that contend that the regulation of practice and procedure in the courts by legislative enactments is an invasion by the legislature of the inherent rights of the court and violates the constitutional doctrine of the separation of powers.

Rules of procedure exist only to save time, to advance the business of the court, to secure to each party a fair opportunity to meet the case against him and to present

his own case, and should not be allowed to be used as a method to obstruct business, waste time or defeat the ends of justice. In matters of practice, pleading and procedure, therefore, it is evident that the rule-making power of the courts should not be hampered or fettered by legislative restrictions or inhibitions. They should be settled by rules of court, which might be changed as actual experience of their operation and application might dictate. Questions of practice and procedure consume a large amount of the time of our nisi prius courts, delay the administration of the law, and the decision of the many perplexing questions they create entails unnecessary labor upon our appellate courts. The delay and expense which now attends the trial of important cases will continue as long as the present, clumsy, inefficient and antiquated methods of practice, pleading and procedure remain.

It has been estimated that at least one-third of the work of our appellate courts consists in passing on the pleadings in personal injury cases. Vested with proper power, the supreme courts could easily prepare simple and short forms of pleadings in personal injury and other cases, forms of complaint for every kind of action, and thus lighten the labors of the bar, of our nisi prius and appellate courts. During the last session of the legislature, I prepared and submitted for their consideration a simple practice act similar to the one endorsed by the American Bar Association, being the type of practice act adopted by the state of New Jersey, by which the supreme court was given the power to adopt rules of practice, procedure and pleading, and providing that such rules should supersede any statutory or common law regulation theretofore existing.

Common Law Power of Judges.—The common law power of judges should be restored. The reason why trials consume so much more time in this country than in England is largely due to the fact that we have withdrawn from the courts their *common law powers to exercise control* over the trial of the cause. Clothed with the power vested in judges by the common law, a judge upon our bench could restrict counsel to the argument of relevant and material questions, could promptly overrule and discourage technical objections, could prevent useless and unnecessary consumption of time by the introduction of immaterial and irrelevant evidence or by the argument of questions as to which the court has a clear and decided opinion, and could without fear of reversal, exercise the necessary authority so essential to the prompt and efficient administration of justice. With the present legislative restrictions, our judges are denied their common law power of summing up the evidence, and thereby presenting the issue clearly and intelligently to the jury, but are converted into mere presiding officers whose principal duty is to confuse the jury by submitting exhausting presentations of legal questions. It has been claimed that the restoration to our state judges of their common law powers, would result in abuse or judicial tyranny but the prompt and impartial administration of the law which has characterized our federal courts as well as the courts in England, conclusively show that these fears are groundless. Increasing the power of our judges by restoring to them rights which have been exercised for centuries by the nisi prius courts of England would tend to elevate the standard of our courts and largely increase their efficiency and result in promoting a more speedy and impartial administration of the law.

Hon. Elihu Root, president of the American Bar Association, speaking of the statutes found in many states and quite recently urged upon congress prohibiting judges from expressing any opinion to the jury upon question of fact, makes the following convincing reply:

"From time immemorial, it has been the duty of the court to instruct juries as to the law and advise them as to the facts. Why is it that by express statutory provision the only advice, the only clarifying opinion and

explanation regarding the facts, which stand any possible chance to be unprejudiced and fair in the trial of a cause, is excluded from the hearing of the jury? It is to make certain that the individual advantages gained by having the best lawyer shall not be taken away. It presents the individual's right to win, if he can, and negatives the public right to have justice done. It is to make litigation a mere sporting contest between lawyers and to prevent the referee from interfering in the game. The fact that such provisions can be established and maintained, exhibits democracy's tendency to yield support to the human interest of the individual as against the exercise of even its own power by its own representatives and for its own highest purpose."

Justice of the Peace and Inferior Courts.—Both should be abolished. District magistrates, under the new plan, take the place of the justice of the peace and inferior courts. They are attached to the county court and their number is determined by the population and the discretion of the judicial council. All the justices of the peace, police magistrates and inferior courts are made by the act first district magistrates. Until otherwise directed by the council, the district magistrates exercise the judicial power of the county court in all matters within the jurisdiction of the justices of the peace, or any cause or matter within the jurisdiction of the county court, assigned especially by the county judge to the district magistrate, or any cause within the jurisdiction of the county court which the parties agree may be heard by the district magistrate. The county judge can transfer any cause from any district magistrate to the county judge or any associate judge of the county court for hearing and determination. The judicial council is authorized to transfer to the district magistrates all or such part of the judicial power of the county courts as they may see proper and can require such district magistrate to perform such duties with respect to the business of the county court or any branch thereof or of any branch office of the clerk of the general court of judicature in the county as the judicial council may determine. The immediate supervision of the work of the district magistrates is in the hands of the county judge; justices of the peace are now practically independent of all supervision and this power of supervision on the part of the county judge eliminates one of the principal defects of the present justice of the peace system.

Selection and Retirement of Judges.—Three plans have generally prevailed in this country for the selection of judges, appointment by the governor, appointment by the chief justice, and election by the people. Since the introduction of the primary system of nominations, this latter method has not proven very satisfactory and there has been a steady decline in the standard of the courts. Under the convention system, which had its origin in our representative theory of government, the lawyers constituted a very considerable proportion of the delegates and on account of their preculiar knowledge of the fitness of the applicant, a higher class of judges were selected. One advantage of the convention system was that there was a sense of responsibility on the part of the delegates, which unfortunately is too often lacking with the voter under the primary nomination plan. The necessary result is that in casting his ballot under the latter system, friendship, locality, personal obligations or prejudice, solicitation or activity of the candidate generally exercise a controlling influence. Under the convention system, the office frequently sought the man, whereas under the primary plan no man can be nominated who does not actively seek the nomination.

The consequence is that under the primary plan we are confined in our choice to those active politicians, who seek the nomination, and the candidate who is the best mixer, who conducts the expensive press bureau, who employs the largest number of workers and agents and who is most industrious in seeking votes or who can appeal to local prejudice or passion, has the best chance of winning, regardless

of qualifications. The test of fitness is no longer knowledge of the law, but the possesion of those qualifications which enables one to become a successful ward politician. Knowledge of human nature, influences that control human action is more important than profound learning of the law. The tricks of the politician count for more than the learning of a Story or a Marshall.

What then is the purpose of an appointment or election but to put into office that man who by reason of his legal knowledge, his impartiality and judicial temperament, independence and high character guarantees a firm, vigorous and impartial administration of the law? Whatever system, whether by appointment or election, that will accomplish these results, is the system we should adopt.

The primary system and the popular election of judges does not tend to create an independent judiciary. On the contrary, its tendency is to incline the judge to yield to popular passion and prejudice, to be swayed by every passing breeze of popular sentiment and to allow his own re-election to exercise a controlling influence in his official conduct. Fortunately, there are many judges who rise above such grovelling influences and who do their duty, even though the thunder of popular disapproval light on their unterrified brows.

The latest conclusions of the American Society of Judicature suggests some very wise solutions of the evils of the present system and are worthy of serious consideration. Under their plan, the chief justice of the highest court in the state and of the unified courts of the state should be chosen by the entire electorate of the state, for a term "neither too long to make him unmindful of public approval, nor too short to make the office worth the strain of repeated campaigns," and should be given the absolute power of selection and appointment of all the other judges of his court, whose positions become vacant during his term of office. It is further suggested by their plan that at stated periods, say at the expiration of three years, at the expiration of nine years and at the expiration of eighteen years from the date of their appointment of each of these judges, the question should be submitted to the entire electorate with reference to the judges who have been sitting for those periods respectively, "shall the judge be retained? Yes or No?" If a majority of the voters vote in the negative the judge is rejected and the chief justice appoints someone else to fill the vacancy.

This plan overcomes one of the chief evils of the present system. No reason can be shown why a judge who is satisfactory should be compelled to submit to a competitive race to retain his position. Whether appointed or elected, the sole question to be submitted to the electorate at the expiration of his term is "Shall John Doe, who has served continuously as judge ..... years be retained; answer yes or no." Then after being retained for two or three terms by the express consent of the voters, the judge is to be continued in office till the age of retirement, without further elections. This plan gives the people the right to recall a judge who is unsatisfactory, but until he is recalled there is no vacancy in his office, and even if the present system is continued, candidates seeking judicial positions must wait until the people have declared that the sitting judge is unsatisfactory and shall not be retained, before they can seek the office.

The campaign rivalry and unseemly contests between judges on the bench and candidates for their position, which under our system has done so much to impair the integrity and independence of the judiciary and to lower the standard of the judicial office, would be ended. A lawyer's reputation is largely local. The qualities which make a successful advocate and attract public attention are not necessarily those qualities which equip a lawyer for a judicial office. If it is difficult for the bar, then how much more difficult is it for the public at large to make a wise and discriminating

choice between candidates for judicial positions. The judge on the bench should not be retired unless his services are unsatisfactory and until the people determine by an election that sole question, he should not be forced to enter into a competive contest to retain his seat. The mass of the people, by whom the judges are elected in these competitive contests, are confessedly ignorant of the fitness or unfitness of the candidates, but they can readily decide whether the sitting judge has been satisfactory and should be retained.

In Conclusion.—The adoption then of the plan for one great court of which all courts of the state are branches or divisions, according to the model law drafted by the American Society of Judicature, and the recommendations of the English Judicature Commission, would unquestionably give Alabama the best judicial structure of any State in the Union. It would not only save the state may hundreds of thousands of dollars by reducing the expenses of the judiciary one-half at least, but would moreover remove the embarrassing, costly and inexcusable defects of our appellate procedure. It would prevent any waste of judicial power, the delays and costs of appeals, of dismissals on acount of mistake in venue, the duplication of clerical work, but would thoroughly organize the work of every court, place the power to make rules in the courts where they belong, and enormously increase the vigor, efficiency and economy of the administration of the law. In this great movement for judicial reform, the bar should become the leaders and not allow any ultra spirit of conservatism to check their zeal in a cause so vital to the future welfare and progress of the commonwealth. When these reforms are accomplished, then and not until then will the promises of the Great Charter be realized—"We will sell to no man; We will delay to no man; We will deny to no man, either right of justice."

EMMET O'NEAL.

Florence, Ala.

BILL OF LADING—NEGOTIABILITY.

95 S. E. 777.

COMMERCIAL NAT. BANK v. SEABOARD AIR LINE RY.

Supreme Court of North Carolina.
April 24, 1918.

A common carrier is not bound by a bill of lading issued by its agent, unless the goods were actually received for shipment, and is not estopped by the bill of lading from showing by parol that no goods were in fact received, although the bill has been transferred to a bona fide holder for value.

Appeal from Superior Court, Wake County; Stacy, Judge.

Action by the Commercial National Bank against the Seaboard Air Line Railway. Judgment sustaining demurrer to complaint, and plaintiff appeals. Affirmed.

The complaint alleged, in effect:

"That it purchased for value and is the owner of certain bills of lading issued by the defendant company through its local freight office in the city of Raleigh which were made to the Raleigh Grain & Milling Company and indorsed to the order of plaintiff, on which bills of lading drafts were attached, drawn by said Raleigh Grain & Milling Company on the consignees, payable to plaintiff, which drafts plaintiffs discounted at their face value."

Then follows itemized statement of drafts and bills, giving names of consignees, etc., and aggregating $5,091.30; that said drafts were returned "not paid," with the information that no goods had been received by the consignees, and that plaintiff is informed and believes that the defendant, the Railroad Company, did not receive the goods as represented by the bills of lading and no shipments were made on account thereof, and that the Raleigh Grain & Milling Company was totally insolvent.

Defendants demur because it appears from the complaint that the goods, as represented by the bills of lading attached to the complaint, were not actually received by defendant and defendant is not bound thereby, although they have been transferred to a bona fide holder for value, and that the copy of the form of bill annexed to complaint contains the notation, shipper's load, and count, etc. There was judgment sustaining the demurrer, and plaintiff excepted and appealed.

HOKE, J. In Williams, Black & Co. v. Railroad, 93 N. C. 42, 53 Am. Rep. 410, it was held that:

"A common carrier is not bound by a bill of lading issued by its agent unless the goods be actually received for shipment; and the principal is not estopped thereby from showing by parol that no goods were in fact received although the bill has been transferred to a bona fide holder for value."

This decision, fully approved in the more recent case of Peele v. Railroad, 149 N. C. 390, 63 S. E. 66, has since been the accepted and unquestioned law of the state, and, to our minds, the ruling is in accord with right reason and sustained by the decided weight of authority in other jurisdictions. Mo. Ry. v. McMadden, 154 U. S. 155, 14 Sup. Ct. 990, 38 L. Ed. 944; Pollard v. Vinton, 105 U. S. 7, 26 L. Ed. 998; Ray & Roy v. Northern Pacific R. R., 42 Wash. 572, 85 Pac. 53, 6 L. R. A. (N. S.) 302, 7 Ann. Cas. 728; Baltimore, etc., R. R. v. Wilkens, 44 Md. 11, 22 Am. Rep. 26; National Bank of Commerce v. Railroad Co., 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566. The position and the principles upon which it may be properly made to rest are very impressively stated by Mitchell, Judge, in the Minnesota case, *supra*, as follows:

"The reasoning by which this doctrine is usually supported is that a bill of lading is not negotiable in the sense in which a bill of exchange or promissory note is negotiable, where the purchaser need not look beyond the instrument itself; that so far as it is a receipt for the goods it is susceptible of explanation or contradiction, the same as any other receipt; that the whole question is one of the law of agency; that it is not within the scope of the authority of the shipping agent of a carrier to issue bills of lading where no property is in fact received for transportation; that the extent of his authority, either real or apparent, is to issue bills of lading for freight actually received; that his real and apparent authority, i. e., the power with which his principal has clothed him in the character in which he is held out to the world, is the same, viz. to give bills of lading for goods received for transportation; and that this limitation upon his authority is known to the commercial world, and therefore any person purchasing a bill of lading issued by the agent of a carrier acts at his own risk as respects the existence of the fact (the receipt of the goods) upon which alone the agent has authority, to issue the bill, the rule being that, if the authority of an agent is known to be open for exercise only in a certain event, or upon the happening of a certain contingency, or the performance of a certain condition, the occurrence of the event, or the happening of the contingency, or the performance of the condition must be ascertained by him who would avail himself of the results ensuing from the exercise of the authority. An examination of the authorities also shows that they apply the same principle whether the bill of lading was issued fraudulently and collusively, or merely by mistake."

And further in the opinion, while recognizing the force of the opposing position, going so far as to say that if the question was *res integra*, it might be allowed to prevail, the learned judge gives the practical suggestions in support of the court's decision as follows:

"But, on the other hand, it may be said that carriers are not in the business of issuing and dealing in bills of lading in the same sense in which bankers issue and deal in bills of exchange; that their business is transporting property; and that if the statements in the receipt part of bills of lading issued by any of their numerous station or local agents are to be held conclusive upon them, although false, it would open so wide a door for fraud and collusion that the disastrous consequences to the carrier would far outweigh the inconvenience resulting to the commercial world from the opposite rule. It is also to be admitted that it requires some temerity to attack either the policy or the soundness of a rule which seems to have stood the test of experience, which has been approved by so many eminent courts, and under which the most successful commercial nation in the world has developed and conducted her vast commerce ever since the inception of carriers' bills of lading."

Suggestions that, to our minds, embody the weightier reason.

It is argued for the plaintiff that as a recent federal statute (chapter 415, Act Aug. 28, 1916, 39 U. S. Stat. at Large, pt. 1, p. 538 [Comp. St. 1916, §§ 8604aaa-8604w]) makes these bills of lading negotiable, the question of public policy involved in these cases and, so far as the federal decisions are concerned, is no longer of weight. On a cursory examination of the statute in question, there is doubt if the law does or was intended to make bills of lading negotiable in the full sense of the term, that is, to the extent that ordinary commercial paper is so. Nat. Bank v. Railroad, *supra*, and see an interesting article on this subject in Michigan Law Review for April, 1918, p. 402. But, if this be conceded, the fact that such a law was deemed necessary to bring about a change, and that Congress considered the subject with its attendant results of such perplexity and importance as to require a statute of 45 sections to deal with it adequately and safely, makes rather against the plaintiff's position as to what the law now is, for ours is only the *jus dicere*, and leads to the conclusion also that, if any change is found desirable, it should be by the lawmaking body, where all the practical suggestions that are presented in such a problem may be fully discussed and determined.

As now advised, we must adhere to our former decision and the judgment for defendant is affirmed.

Affirmed.

BROWN, J., did not sit, and took no part in the decision of the case.

NOTE.—*Liability of Carrier to Bona Fide Holder of Bill of Lading Negligently or Fraudulently Issued.*—There is considerable diversity of view as to the holding made by the instant case, and in some of the States a provision has been made by statute, as article in Michigan Law Review (April, 1918) shows is the case as to interstate commerce. It is to be inferred that the instant case regards the act of Congress as confirmatory of the view it takes of the matter. But it may be thought that Congress merely recognized the ruling made in Pollard v. Vinton, 105 U. S. 7, 26 L. ed. 998 and Mo. Ry. v. McFadden, 154 U. S. 155, 14 Sup. Ct. 990, 38 L. ed. 944.

In Sealy v. M. K. & T. R. Co., 84 Kan. 479, 114 Pac. 1077, 41 L. R. A. (N. S.) 500, the ruling turned upon the meaning of a Missouri statute, which in terms made bills of lading negotiable "in the same manner as bills of exchange and promissory notes," after proper indorsement. Independently of that statute Missouri courts had expressed the view held by the instant case, but the Kansas court held that the Missouri statute changed that rule. And the Kansas court declared its own view in a later case differently from that held in the instant case, citing several antecedent Kansas cases. Harved v. Ry. Co., 93 Kan. 456, 144 Pac. 823, citing Savings Bank v. A. T. & S. F. R. Co., 20 Kan. 519, Ry. Co. v. Hutchings, 78 Kan. 758, 99 Pac. 230; Hutchings v. Ry. Co., 84 Kan. 479, 114 Pac. 1079.

It was argued by the court that: "There is no difference in the legal consequences flowing from a bill issued without receipt of the goods at any time, and one issued before the goods are received, provided a loss falls upon the transferee in the usual course of business as a direct consequence of the misstatement." It is said the rule in Kansas "invests the innocent holder of a bill of lading with rights not available to the original holder."

In Dulaney v. Phila. & R. R. Co., 228 Pa. 180, 77 Art. 507, it was held that where a number of connecting railroads enter into arrangements by which they employ agents at different points to solicit freight and one of them issues a bill of lading without the initial carrier ever having received the goods and knowing that it is to be attached to a draft on consignees the latter paying the draft but never receiving the goods, may recover the amount from the terminal carrier, as there was a joint liability on the part of all of the companies, whether the bill of lading be in fact negotiable or not.

It was said: "The negotiability or non-negotiability of the bill is not in question. Even though one would have been protected by the delivery of the goods without getting possession of the bill, the carrier had the right to demand it before making the delivery, and the plaintiffs were justified in presuming that such a demand would be made; they only did the natural and proper thing in accordance with the usual course when they paid the draft and took up the bill."

This case distinguishes a case where consignee knew as matter of fact before he paid the draft that the railroad had not received the articles stated in the bill of lading. L. S. & M. S. R. Co. v. Natl. Live Stock Bank, 178 Ill. 506.

In Roy & Roy v. N. P. Ry. Co., 42 Wash. 572, 85 Pac. 53, 6 L. R. A. (N. S.) 302, the same ruling is made as in the instant case, the court, however, predicating its conclusion upon federal ruling, as then existing, on the ground, that this being a question of general commercial law this ruling ought to be followed, which also was the view in National Bank v. R. Co., 44 Minn. 224, 46 N. W. 342, 9 L. R. A. 263, 20 Am. St. Rep. 566.

In Bk. of Batavia v. New York &c. R. Co., 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440, it was said that: "If he (the carrier) desires to limit his responsibility * * to the named consignee alone, he must stamp his bill as 'non-negotiable,' and where he does not do that, he must be understood to intend a possible transfer of the bills and to affect the action of such transferees."

It would seem that this question is regulated in quite a number of states and there are cases on the validity and construction of such statutes. Thus Yazoo & M. V. R. Co. v. G. W. Bent & Co., Miss., 47 So. 805, 22 L. R. A. (N. S.) 821, held that statute making a bill of lading conclusive evidence of the receipt of the statement made in a bill of lading is valid.

So greatly has this subject been regulated by statute that the question is academic in only a few states. It would seem there is not necessarily a question of negotiability involved in holding it negotiable nor the carrier liable on a bill though no goods have been received by it for transportation. C.

HUMOR OF THE LAW.

Schuyler Merritt, congressman from Stamford, Conn., said at a dinner:

"As one of the heads of a large manufacturing concern, I am much interested in the Bolshevik propaganda among the Russian factories.

"I am afraid the Bolshevik ideas won't go. I heard the other day of a Russian employer who said mildly to a delegation of striking Bolshevik hands:

"'I can understand your demands for an increase of 900 per cent in wages, but why do you insist on my reducing your hours of work from ten a day to two?'

"A young Bolshevik struck his employer jovially on the back.

"'We've got to have time,' he laughed, 'to spend our increased wages, haven't we?'"

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

Alabama.....9, 20, 24, 27, 46, 58, 82, 89, 90
Arkansas.....11, 57, 77 84
Connecticut.....26 32, 66
Georgia.....96
Illinois.....53, 64, 78
Indiana.....4, 45, 49, 72, 88
Louisiana.....1, 42, 65
Maine.....31, 36, 99
Maryland.....71, 100
Massachusetts.....30
Michigan.....28, 37, 40, 43, 54, 59, 63, 67, 73, 74, 75, 79, 80, 83.
Mississippi.....87
Missouri.....2, 18, 19, 25, 33, 39, 41, 47, 48, 56, 60, 62, 70, 81, 93.
New Jersey.....10, 14, 34, 85, 86, 91
New York.....12, 13, 15, 21, 23, 50, 55, 61, 69, 76, 98
Pennsylvania.....92
Rhode Island.....16, 68
Tennessee.....29, 35, 94
U. S. C. C. App......3, 5, 6, 17, 38, 44, 95
United States D. C......7, 8, 52
United States S. C......22, 51, 97

1. **Attorney and Client**—Imputability.—Attorney's knowledge obtained from abstract as to claims of third persons and doubtful validity of vendor's title held imputable to his client, the purchaser.—Allen v. Frank Janes Co., La., 78 So. 115.

2. **Bankruptcy**—Chattel Mortgage.—Under Rev. St. 1909, §§ 2861, 2887, and 2889, seller of motor car, who received as payment notes reserving title and giving him chattel mortgage, is not, having withheld same from record, entitled to record same and take possession of car as against creditors whose claims had meantime arisen, so where debtor became a bankrupt few days after seller took possession, his lien is subject to attack by trustee in bankruptcy.—Stewart v. Asbury, Mo., 201 S. W. 949.

3.——Court Rules.—Where an extension of time for filing a petition to revise was obtained, such petition may be considered, though not filed within the 10-day period prescribed by court rule 38 (235 Fed. xi, 148 C. C. A. xi).—In re Armann, U. S. C. C. A., 247 Fed. 954.

4.——Inchoate Interest.—Under Burns' Ann. St. 1914, § 3052, a wife's inchoate interest in her husband's land, given her by sections 3014 and 3029, becomes absolute when his title is transferred by adjudication to the trustee in bankruptcy, and before trustee's sale thereof.—Harlin v. American Trust Co., Ind., 119 N. E. 20.

5.——Insurance.—An industrial policy, not payable with certainty to any beneficiary, and which it did not appear the insurer would certainly buy, held to have no cash surrender value, and so not to pass to the trustee in bankruptcy, under section 70a, subds. 3, 5.—In re Gannon, U. S. C. C. A., 247 Fed. 932.

6.——Liens.—Under Bankrutpcy Act July 1, 1898, § 47a, as amended Act June 25, 1910, § 8, trustee in bankruptcy must be deemed vested with status of lien creditor, though there were no such creditors at time petition in bankruptcy was filed, and hence is entitled to attack chattel mortgages not recorded by mortgagee until discovery that debtor was in failing circumstances.—National Bank of Bakersfield v. Moore, U. S. C. C. A., 247 Fed. 913.

7.—Preference.—Where parties plaintiff and defendant in suit by trustee of bankrupt to set aside alleged fraudulent transfer were residents of same state, and transfer was made more than year before filing of petition, federal court had no jurisdiction, either by reason of diversity of citizenship or under Bankruptcy Act, §§ 60b, 67, providing for the setting aside of preferential transfers made within four months of filing of petition.—Hall v. Glenn, U. S. D. C., 247 Fed. 997.

8.——Void Transfer.—In suit by trustee in bankruptcy to set aside bankrupt's transfer of real property under Bankruptcy Act, § 70e, law of state in which property was located governs, and transfer cannot be set aside, unless subject to attack under such laws.—Hall v. Glenn, U. S. D. C., 247 Fed. 997.

9. **Banks and Banking**—Notice of Invalidity.—While transfer of notes by cashier is presumed prima facie to be in due course of business and binding upon bank, if it shows on its face that transferee must have known cashier was assuming a power outside of his duties, not for purposes of the bank, the transfer will be regarded as unauthorized and not binding on the bank, even though the transferee paid value therefor.—Choctaw Bank v. Gewin, Ala., 78 So. 96.

10. **Brokers**—Negligence.—Agents undertaking to procure title to realty for illiterate purchaser, but negligently procuring title to other realty, without purchaser's knowledge, are liable to purchaser for their negligence.—Towski v. Griffiths, N. J., 103 Atl. 192.

11. **Carriers of Goods**—Baggage.—Jewelry is "baggage," and an interstate carrier cannot make it otherwise by rules and regulations filed with the Commerce Commission, although it can properly limit the amount of its liability, under Kirby's Dig. § 6615.—Bush v. Beauchamp, Ark., 201 S. W. 828.

12.——Delivery.—Placing car upon public team track, for plaintiff to unload, concurred in and acted upon by plaintiff, was complete delivery, and terminated obligation of defendant as common carrier.—Anthony & Jones Co. v. New York Cent. & H. R. R. Co., N. Y., 119 N. E. 90, 223 N. Y. 21.

13.——Notice of Special Damage.—Notification of express company by shipper of moving picture films that films were to be "rushed" because they were to be exhibited, held insufficient to render express company, delaying shipment, liable for special damages or loss of profits in operation of consignee's theater.—Chapman v. Fargo, N. Y., 119 N. E. 76, 223 N. Y. 32.

14. **Carriers of Passengers**—Assault and Insult.—A carrier must guard its passengers from assaults and insults from their fellow passengers and strangers, if by high degree of care an assault or injury might have been prevented. —Hoff v. Public Service Ry. Co., N. J., 103 Atl. 209.

15.——Relation of Passenger.—When a person presents himself at the entrance of a street car for boarding it, and is so recognized by the conductor, the relation of passenger exists, although the passenger has not actually boarded the car.—Garricott v. New York State Rys., N. Y., 119 N. E. 94, 223 N. Y. 9.

16. **Charities**—Monument.—"Monument" held used by testator, in creating trust fund, in sense broader and more comprehensive than of conventional commemorative monument to persons dead.—Rhode Island Hospital Trust Co. v. Benedict, R. I., 103 Atl. 146.

17. **Chattel Mortgages**—Constructive Notice.—Under Civ. Code Cal. § 2955, chattel mortgage on merchant's stock in trade, though recorded, imports no constructive notice to the world, and, though valid between parties, is invalid as to creditors of mortgagor and subsequent purchasers for value in good faith.—National Bank of Bakerfield v. Moore, U. S. C. C. A., 247 Fed. 913.

18.——Replevin.—In replevin by the assignee of notes and a chattel mortgage given to secure the price of goods sold, defendant may set up any matter of defense or relief she may have, including one of partial failure of consideration in that she has paid more than the worth of the property.—Scheidel Western X-Ray Co. v. Bacon, Mo., 201 S. W. 916.

19. **Commerce**—Employe.—Railroad yardmaster employed by terminal railway company, injured while engaged in attempting to replace derailed engine on track so as to remove it and clear tracks for transportation of interstate commerce, was engaged in interstate commerce at time of his injury.—Spaw v. Kansas City Terminal Ry. Co., Mo., 201 S. W. 927.

20.——Franchise Tax.—Acts 1915, p. 397, § 16, imposing franchise tax on foreign corporations, based on capital actually employed within state, is not unconstitutional as unwarranted burden on interstate commerce.—Louisville & N. R. Co. v. State, Ala., 78 So. 93.

21. **Constitutional Law**—Obligation of Contract.—If the state could deprive an officer of the salary of his office by refusing to make appropriation therefor, it would impair its direct obligation.—O'Neil v. State, N. Y., 119 N. E. 95, 223 N. Y. 40.

22.—Statutory Law.—As a state cannot, under Const. U. S. Amend. 14, forbid a citizen from entering into contract without its limits while remaining within, Rev. St. Mo. 1899, § 7897, which is a nonforfeiture statute, held not to apply to loan agreement between a Missouri policyholder and a New York company licensed to do business in the state, where it was expressly stipulated that the New York law should govern. —New York Life Ins. Co. v. Dodge, U. S. S. C., 38 S. Ct. 337.

23.——Written Constitution.—Canadian Dominion Parliament not being bound by written constitution, and power to repeal or amend every act being reserved by Rev. St. Canada, c. 1, § 47, rate of assessment of beneficiary society chartered by Dominion may be changed by amendment of charter by Dominion Parliament, irrespective of whether power was expressly reserved by the beneficiary society, in contract with certificate holders, to change assessment rates.—McClement v. Supreme Court, I. O. F., N. Y., 119 N. E. 99, 222 N. Y. 470.

24. **Contracts**—Illegality. — Where plaintiff's son seduced defendant, who, with her family, agreed to forego prosecution if plaintiff would indorse notes to defendant, and the indorsement was executed so far as transfer of title was concerned, the contract being illegal, plaintiff could not have cancellation of the indorsement and retransfer of title, especially as her further and executory liability as indorser was subject to the complete defense of illegality.—Berry v. Dunn, Ala., 78 So. 51.

25. **Covenants**—Void Deed.—That deed from defendant's grantee to unincorporated company and from it to plaintiff's grantor were void, held not to deprive plaintiff of right to sue on defendant's covenant of seisin, where in a suit by heirs of defendant's grantee against the company and plaintiff's grantor a final decree was rendered that the land was owned by plaintiff's grantor, in view of Rev. St. 1909, § 2793.—Talbert v. Grist, Mo., 201 S. W. 906.

26. **Damages** — Breach of Contract. — For breach of building contract partially performed, rule as to damages is profits contractor would have realized after deducting from contract price cost of materials and labor.—Warner v. McLay, Conn., 103 Atl. 113.

27. **Dedication**—Injunction.—Owner abutting on street, whose property was bounded on other sides by other streets, could maintain bill to enjoin city from converting street or part thereof into public cemetery.—City of Troy v. Watkins, Ala., 78 So. 50.

28. **Depositions**—Objections.—In action for loss of freight in shipment a card containing sealed record taken when car was delivered to consignee, although not attached to deposition of witness who identified it and stated its contents, should have been admitted, where there was no objection made at time deposition was taken.—Oceana Canning Co. v. King, Mich., 166 N. W. 847.

29. **Divorce** — Collateral Attack. — Although where plaintiff went to a foreign jurisdiction, solely for the purpose of instituting divorce proceedings, on service by publication the decree may be attacked for fraud by action in a foreign state, yet such attack cannot be sustained where the plaintiff removed with the bona fide purpose of making a home in such state.—Kenner v. Kenner, Tenn., 201 S. W. 779.

30. **Domicile**—Residence.—Though actual residence is circumstance tending to establish place of domicile at place of residence, it is not conclusive, and personal presence in place, even for protracted period, does not of necessity fix domicile in that place.—White v. Stowell, Mass., 119 N. E. 121.

31. **Easements**—Footpath.—A deed of a right "to pass to the highway by the shore of the flowage, such as will convene his purpose," to an Indian without horses, held not to grant a cartway or a way to be used by automobiles, but simply a footpath.—Dana v. Smith, Me., 103 Atl. 157.

32. **Eminent Domain**—Benefits and Damages. —That plaintiff, owner of realty, appeared before board of benefits and damages without making any claim that prior proceedings for widening street was invalid, held not to estop him from asserting invalidity of proceedings where he had no knowledge of irregularities when he appeared before board.—Crawford v. City of Bridgeport, Conn., 103 Atl. 125.

33. **Equity**—Mistake of Law.—While equity will not relieve from a mistake of law, a bank

which loaned money to pay a first trust deed and taxes under false representations that a third trust deed was satisfied, accompanied by a showing of a note which was in fact forged, and the satisfaction of which was forged, was entitled to relief on the ground of mistake of fact.—State Sav. Trust Co. v. Spencer, Mo., 201 S. W. 967.

34. **Estoppel**—Evidence.—Where plaintiff to support his case offers his written release of all claims against defendant for damages, and testifies, without contradiction, that he never executed the release, and that his signature was obtained by fraud, he destroys evidencial value of the release, and cannot use it to support consideration for different oral promise.—McDonald v. Central R. Co. of New Jersey, N. J., 103 Atl. 198.

35.——Privity.—Where neither complainant nor his predecessors in title were connected with a litigation against defendant's predecessors or had any knowledge of allegations in pleadings therein, there could be no estoppel in favor of complainant by reason of allegations against defendant or its predecessor, there being no mutuality or privity.—Kobbe v. Harriman Land Co., Tenn., 201 S. W. 762.

36. **Explosives** — Wanton Injury. — Evidence that six-year-old boy secured nitroglycerin caps under or near portable shed which defendant used as office in selling lots and was injured by throwing them in fire several days later does not establish that defendant wantonly injured or exposed him to danger, even though boy be considered licensee.—Kidder v. Sadler, Me., 103 Atl. 159.

37. **Fixtures**—Mortgage.—Letters from mortgagor to second mortgagee redeeming from first mortgage, referring to fact that second mortgagee had become the "owner of the property," did not amount to surrender by mortgagor either of title or right to possession of machinery on mortgaged premises.—O'Dell v. Day, Mich., 166 N. W. 872.

38. **Food**—Action.—A domestic employed in a family of one who purchased pork product prepared by defendant from diseased pork and sold by it to a retailer who sold it to her employer in case of defendant's negligence could recover for sickness resulting from eating the food, though there was no contractual relation between her and defendant.—Cox v. New England Equitable Ins. Co., U. S. C. C. A., 247 Fed. 955.

39. **Fraud**—Deceit.—Neither new nor second-hand X-ray machines are commonly used, and where plaintiff's agent, who was selling these machines, helped plaintiff's assignor in selling to defendant, who knew nothing about their value, seller's statement of value was more than mere opinion, amounting to deceit.—Scheidel Western X-ray Co. v. Bacon, Mo., 201 S. W. 916.

40.——Variance.—Where the declaration alleged that the vendor took the purchaser to the lots and pointed out the fact that the sidewalks were laid and stated that they were paid for, and the proof showed that the statement was made in the office, and not on the ground, the variance was not fatal.—State Security & Realty Co. v. Badger, Mich., 166 N. W. 950.

41. **Fraudulent Conveyances** — Entireties. — Where property, held by husband and wife in entirety, was by them conveyed to a third party with agreement to reconvey to the wife alone, she having paid the consideration therefor out of her separate estate, and the husband being in financial difficulties, such transaction was not one in fraud of creditors, precluding equitable aid, where third party violated his agreement.—Butte Inv. Co. v. Bell, Mo., 201 S. W. 880.

42. **Gas**—Negligence.—Where escape of natural gas from pipe lines could be heard and, when lighted, seen, owner, not learning of leak until injury to child, and whose perfunctory inspection was not likely to have informed it of leak, was negligent in not discovering leak, and liable for injury.—Jackson v. Texas Co., La., 78 So. 137.

43.——Penalties.—If the penalty provided for violation of ordinance limiting the price of gas is not excessive in each particular case, it is not excessive as matter of law; nor is it made excessive by the fact that its violations would be many and its aggregate penalties large.—City of Kalamazoo v. Kalamazoo Circuit Judge, Mich., 166 N. W. 998.

44. **Husband and Wife**—Indemnity.—Where officers and stockholders of bank entered into agreement to save surety harmless, on account of bond given to secure deposit of county funds, such indemnity agreement being one of the community under the laws of Washington, the wives of the indemnitors were proper parties in an action thereon.—National Surety Co. v. Blumauer, U. S. C. C. A., 247 Fed. 937.

45. **Indictment and Information**—Intoxicating Liquor.—Indictments and affidavits following statute in charging that defendant in county of state on particular date named kept, ran, and operated place where intoxicating liquors were unlawfully sold, in violation of laws of state, are sufficient under Burns' Ann. St. 1914, § 8351.—Haymond v. State, Ind., 119 N. E. 5.

46. **Injunction**—Equity.—Where an infant wife separately acknowledged a homestead conveyance, the grantee's bill to enjoin an action in ejectment by the husband against him had no equity, since he had a complete defense to the action.—Sims v. Gunter, Ala., 78 So. 62.

47. **Insurance**—Assessments.—If insured in fact paid one assessment with which the assessment plan company did not credit him, and the company thereafter failed to send him notices of assessments, he was thereby relieved from paying assessments, and it was proper to instruct that he could recover if paid the first assessment which the insurer alleged he had not paid.—Rasch v. Bankers' Life Co. of Des Moines, Iowa, Mo., 201 S. W. 919.

48.——Assessment Plan.—In an action on assessment plan policy, where the insurer set up failure to pay a call consisting of three items, instructions using the word "assessment" were not necessarily erroneous, especially where the parties throughout the trial used such word to designate the entire call.—Rasch v. Bankers' Life Co. of Des Moines, Iowa, Mo., 201 S. W. 919.

49.——Beneficiary.—Upon delivery and acceptance of life policy promising to pay to insured's second wife for her sole use if living, or if not living to "their children," insured's son by first wife took an interest contingent upon his and insured's surviving primary beneficiary.—Pape v. Pape, Ind., 119 N. E. 11.

50.——Burglary.—Subletting part of his loft by a manufacturer of ladies' waists to a manufacturer of embroideries was a violation of a clause in a burglary policy that premises should not be occupied for any other purpose than that specified.—Liss v. United States Fidelity & Guaranty Co., N. Y., 169 N. Y. S. 1027.

51.——Foreign Corporation.—A clause in a life policy, issued by a foreign insurer licensed to do business in Missouri, which provided that loans could be obtained by the insured on the sole security of the policy, imposed no obligation on the insurer to make such loans, if the Missouri statute applied and prohibited hypothecation of the reserve as security.—New York Life Ins. Co. v. Dodge, U. S. S. C., 38 S. Ct. 337.

52.——Fraternal Society.—Where Massachusetts Attorney General did not consent to dissolution of fraternal benefit society organized under laws of Massachusetts, etc., federal court could not grant relief at suit of non-resident members; St. Mass. 1911, c. 628, §§ 24, 25, having been in force when contracts of insurance were entered into, and thus having become part thereof.—Cummings v. Supréme Council of Royal Arcanum, U. S. D. C., 247 Fed. 992.

53.——Incontestability.—In action on life policy, providing that it should be noncontestable after two years, insurer could not set up breach of warranty, where more than two years had expired, although insured died before such time.—Monahan v. Metropolitan Life Ins. Co., Ill., 119 N. E. 68.

54.——Malpractice.—That insurance company has insured physician against malpractice suits by "Physician's Liability Policy" does not permit one suing physician for malpractice to join the company as defendant; plaintiff having no right

of action against the company.—Bowers v. Gates, Mich., 166 N. W. 880.

55.——Open Policy.—Open policy insuring automobile against theft, etc., from noon on certain day to noon of later date, construed with certificates keeping policy in force from August 30, 1913, to September, 1913, held in force from noon of August 30th, to noon of September 30th. —Troy Automobile Exch. v. Home Ins. Co., N. Y., 169 N. Y. S. 796.

56.——Total Loss.—There need not be an absolute extinction of all the parts of a building in order for it to be "wholly destroyed."—Horine v. Royal Ins. Co., Limited, of Liverpool, Mo., 201 S. W. 958.

57.——Waiver.—An accident association did not waive its rights under forfeiture clause by accepting premium for policy's renewal where insured was not then engaged in prohibited occupation, although he had previously been so engaged.—Interstate Business Men's Acc. Ass'n v. Greene, Ark., 201 S. W. 799.

58. **Intoxicating Liquors**—Interstate Transaction.—Evidence that accused was employed to transport intoxicating liquors through Alabama in transit from Georgia to Florida by automobile to make a test case, and that such method of transportation was unusual, held to make jury question whether defendant's engagement in interstate commerce was bona fide or subterfuge to avoid Alabama prohibition laws.—Morgagne v. State, Ala., 78 So. 98.

59.——Residence District.—Where building had been used as a saloon for many years, and it was east of a blacksmith shop, immediately north of business houses, and south of residences, it was in the "business district," and consent of property owners within 300 feet was not required under the Warner-Crampton Act, § 37.—People v. Kirchoff, Mich., 166 N. W. 944.

60. **Licenses**—Occupations.—Under Charter of St. Louis, art. 3, § 26, cl. 5, giving power to license, regulate, or tax certain named occupations "and all other business trades, avocations or professions whatever," applies to one dealing in used bottles, whether his occupation be specifically named or not.—City of St. Louis v. Baskowitz, Mo., 201 S. W. 870.

61.——Regulation.—The state may not prohibit the lawful business of purchasing milk or cream, but it may regulate a business, however honest in itself, if it may become a medium of fraud, compelling honesty by imposing a license fee if widespread frauds upon and losses by its people are prevented.—People v. Beakes Dairy Co., N. Y., 119 N. E. 115.

62.——Occupation Tax.—Where one has paid a merchant's tax, both state and city, the exaction of a junk merchant's occupation tax also is not violative of the provisions against double taxation.—City of St. Louis v. Baskowitz, Mo., 201 S. W. 870.

63. **Malicious Prosecution**—Probable Cause.—Where defendant in action for malicious prosecution fully and fairly stated all material facts to prosecuting attorney, and attorney advised making complaint, and instructed justice of peace that warrant might issue, defendant cannot be deemed to have acted without probable cause.—Thomas v. Bush, Mich., 166 N. W. 894.

64. **Mandamus**—Pleading.—A petition for mandamus for restoration to office must show existence of office where created by ordinance, his legal right thereto, the ordinance should be properly pleaded, and he must show he is a de jure officer.—People v. Coffin, Ill., 119 N. E. 54.

65. **Master and Servant**—Child Labor Act.—Under Child Labor Act, forbidding employment of child under 16 and over 14 years without age certificate, employer of child between such ages injured in course of employment may plead and prove contributory negligence.—Flores v. Steeg Printing & Publishing Co., La., 78 So. 119.

66.——Course of Business.—When injuries from an assault by one employe upon another arise out of or are incident to protection by the injured servant of the person, property, or interest of the employer, compensation may be awarded, but not where the assault does not serve those ends.—Jacquemin v. Turner & Seymour Mfg. Co., Conn., 103 Atl. 115.

67.——Course of Employment.—Where one servant at work as riveter's helper was seized by another, who held an air hose to his rectum while a third turned on the air, injuring him, such injury arose in the course of, but not out of, his employment, as required for recovery under Workmen's Compensation Act.—Tarpper v. Weston-Mott Co., Mich., 166 N. W. 857.

68.——Independent Contractor.—One contracting to move a boiler from one place to another, where no instructions were given as to route or manner of getting it there, was an independent contractor.—Lake v. Bennett, R. I., 103 Atl. 145.

69.——Negligence.—Negligence of foreman of express company, in charge of placing of goods on platform for shipment, in not using reasonable care to so place goods as not to subject servants to unnecessary danger, is negligence of company.—Maguire v. Barrett, N. Y., 119 N. E. 79, 223 N. Y. 49.

70.——Pleading.—Where plaintiff alleged that defendant permitted an automobile to be driven by his agent so as to strike plaintiff, proof of the ownership of the automobile was admissible as tending to show that defendant did permit such driving, though it was not specifically alleged that defendant owned the automobile.—Edwards v. Yarbrough, Mo., 201 S. W. 972.

71.——Respondeat Superior.—Employe of logging company, using hand car on its railroad to go home from work after working hours, was not, at time of his death in collision with train, an employe of logging company or subsidiary railroad.—Kendall Lumber Co. v. State, Md., 103 Atl. 141.

72.——Safe Working Place.—Window and stick inserted against window sash a few feet from machine at which wire factory employe was working, held part of his working place within Laws 1911, c. 88, § 3, relating to risks of employment due to defective working places, etc.—Indiana Steel & Wire Co. v. Studes, Ind., 119 N. E. 2.

73.——Workmen's Compensation Act.—As Workmen's Compensation Act does not provide compensation for occupational diseases, plaintiff employed as mahogany stainer, an occupation necessitating his getting his hands into staining solution, could not recover for an infection to his hand; there being no evidence of an accident in course of employment.—Jerner v. Imperial Furniture Co., Mich., 166 N. W. 943.

74.——Workmen's Compensation Act.—Industrial Accident Board has no jurisdiction of servant's claim for compensation under Workmen's Compensation Act, where servant was employed upon a car ferry in interstate commerce when accident occurred.—Thornton v. Grand Trunk-Milwaukee Car Ferry Co., Mich., 166 N. W. 833.

75.——Workmen's Compensation Act.—The owner of a hotel is not pursuing his business within meaning of Workmen's Compensation Act when he causes rooms to be occasionally painted and decorated, although it is usual to have work of that nature done from time to time.—Holbrook v. Olympia Hotel Co., Mich., 166 N. W. 876.

76.——Workmen's Compensation Act.—A janitor in defendant's office building, who lived in a house rented from defendant at some distance from the office building, who was killed by a charged electric wire falling across his lawn just as he was leaving his home to go to work, was not killed upon "the premises or at the plant" of his employer, within Workmen's Compensation Act, § 3, subd. 4.—Murphy v. Ludlum Steel Co., N. Y., 169 N. Y. S. 781.

77. **Mortgages**—Foreclosure.—In suit to foreclose mortgage which correctly described 40-acre tract, omitted by clerical misprision from decree of foreclosure, court could properly proceed, though copy of mortgage, an exhibit, did not include such tract, by amending decree of foreclosure and sale prepared for entry of record to include tract.—Blasingame v. Lowdermilk, Ark., 201 S. W. 807.

78. **Municipal Corporation**—Civil Service Law. —Repeated appropriations by a city for the salary of an "expert on system and organization" and action of civil service commissioners in

certifying plaintiff to said position, and his appointment and acceptance in pursuance of the Civil Service Law, show a legal employment.—People v. Coffin, Ill., 119 N. E. 54.

79.——Contributory Negligence.—Contributory negligence of pedestrian proceeding diagonally across 30-foot street, with his back towards vehicles to be expected on that side of street, with his coat collar up and his head down, not only failing to look, but apparently engrossed in thought, held to bar recovery for his death by being struck by automobile.—Fulton v. Mohr, Mich., 166 N. W. 851.

80.——Instructions.—In an action for the death of a pedestrian, struck by an automobile on a city street, failure to instruct that defendant owed a duty to pedestrians to give audible warning of his approach was reversible error, in view of Pub. Acts 1909, No. 318, § 7, subd. 2, and section 6, subd. 1.—Johnston v. Cornelius, Mich., 166 N. W. 983.

81.——Motor Vehicles.—Where two motor vehicles approach each other on a city street, if it is impracticable for one of them to turn to the right, without crossing the path of the other, it is his duty to stop.—Edwards v. Yorbrough, Mo., 201 S. W. 972.

82.——Public Highway.—Public highways belong to public, and there is no such thing as the rightful, private, permanent use of a public highway, and one who uses a public highway for his own private use commits indictable public offense, though he does so with permission of municipal authorities.—City of Troy v. Watkins, Ala., 78 So. 50.

83.——Resulting Damage.—Where illuminating and heating company had laid its conduits in public alley, contractor, excavating basement partly in alley so as to cause cave-in injuring such conduits, was liable for resulting damage.—Edison Illuminating Co. v. Misch, Mich., 166 N. W. 944.

84. **Names**—Presumption.—The fact that the name of one signing as a notary appeared to be that of a woman is not conclusive that the officer was of that sex.—Terry v. Klein, Ark., 201 S. W. 801.

85. **Negligence**—Proximate Cause.—Where decedent, a member of a municipal body, was invited by their engineers to examine sewage disposal plants, and while inside a "septic tank" was killed by explosion of gas, when third person lit a match in disregard of warning, act of third person was the proximate cause of death.—La Rue v. Potts, N. J., 103 Atl. 197.

86. **Principal and Agent**—Attorney and Client.—Solicitor employed to report on title deeds, transact legal matters, etc., was a special agent whose agency could not be enlarged by receiving additional money from borrower to apply on liens on borrower's land, so as to make employing association liable for his misappropriation of such money.—Scherer v. Post Office Building & Loan Ass'n, 103 Atl. 202.

87.——Traveling Salesman.—A traveling salesman for a milling company, supplied with sale blanks, had no apparent authority to compromise a claim for damage for goods not shipped, so that a compromise made by him was no defense to an action for the price of other goods.—Dahnke-Walker Milling Co. v. T. J. Phillips & Sons, Miss., 78 So. 6.

88. **Railroads**—Crossing.—Where plaintiff, a child of ten, was injured at a railroad crossing, she being lawfully upon the highway, a general allegation of negligence is sufficient as against demurrer.—Chicago, T. H. & S. E. Ry. Co. v. Barnes, Ind., 119 N. E. 26.

89.——Closing Street.—Where railway company and city agreed that certain public streets should be used exclusively by company, and that in lieu thereof company should maintain on its own land certain other streets designated as private streets which contract has been ratified by Legislature, neither company nor its successor can close street so designated or prevent abutting owners from using it.—Greil v. Stollenwerck, Ala., 78 So. 79.

90.——Look and Listen.—The driver of automobile should not permit his car to proceed to a point where approach of train cannot be observed or noted in time to avoid danger.—Rothrock v. Alabama Great Southern R. Co., Ala., 78 So. 84.

91.——Proximate Cause.—Where crossing collision killed a horse, destroyed a wagon, and scattered its contents, which were probably stolen, and the driver, who was alone in charge, was stunned, jury might find that collision was proximate cause of loss of contents of wagon.—Brower v. New York Cent. & H. R. R. Co., N. J., 103 Atl. 166.

92. **Receivers**—Auditing Accounts.—Where receiver was authorized to carry on a company's business, expense of audit, and receiver's authorized certificates should be paid in full as part of costs prior to distribution.—Pennsylvania Engineering Works v. New Castle Stamping Co., Pa., 103 Atl. 215.

93. **Sales**—Description of Property.—Where advertisement for sale of cattle catalogued the animals, and stated "every animal of breeding age catalogued in this sale has been a regular breeder," and plaintiff told defendant that he desired to buy some cows for breeding purposes, and defendant's agent told plaintiff that a cow which he later bought was then with calf, there was a warranty that the cow was a breeder and then with calf.—Blair v. Hall, Mo., 201 S. W. 945.

94.——Mutuality.—Contract based on letter stating, "You may enter our contract for a minimum quantity of one hundred twenty tons, maximum quantity of one hundred forty-five tons" of paper specifying the prices and terms held not void for uncertainty or lack of mutuality.—Southern Pub. Ass'n v. Clements Paper Co., Tenn., 201 S. W. 745.

95. **Specific Performance**—Evidence.—Where it was merely question of surmise whether, if defendants had complied with their portion of agreement, foreclosure could have been avoided, specific performance of agreement to exchange lands will not be decreed, where complainant had lost title to land he was to convey by mortgage foreclosure.—Winston v. Brown, U. S. C. C. A., 247 Fed. 948.

96. **Trusts**—Power of Appointment.—Where grantor conveyed land in trust for himself and wife for life, with remainder over on death of survivor, and directed trustee, on wife's written request, to convey on such terms as she directed, the power contemplated only a bona fide and valid sale for a sufficient valuable consideration, and did not authorize conveyance as a gift or upon a nominal consideration.—Taylor v. Phillips, Ga., 95 S. E. 289.

97. **United States**—Injunction.—Where Postmaster General, acting under Appropriation Act March 9, 1914, authorizing expenditures for experimental deliveries, determined in interests of service that experiment should be conducted at Washington, D. C., and First Assistant Postmaster General, as authorized by its terms, notified plaintiff in writing of cancellation of contract for collecting and delivering mail in Washington, plaintiff's suit to enjoin annulling contract must be deemed one against United States.—Wells v. Roper, U. S. S. C., 38 S. Ct. 317.

98. **Vendor and Purchaser**—Option.—Where defendants' ancestor in title gave option to college trustees to take so much land as they "may choose for a reservoir site," the choice was with the grantee, and it could not be limited in its choice to prepared plans or present needs.—Trustees of Hamilton College v. Roberts, N. Y., 119 N. E. 97, 223 N. Y. 56.

99. **Waters and Water Courses**—Riparian Rights.—A grant of "all the riparian rights" in grantor's land, when limited "for the purpose specified," and "confining the flowage to the height of the dam," gave grantee only rights in grantor's land as far as flowage affected it.—Portland Sebago Ice Co. v. Phinney, Me., 103 Atl. 150.

100. **Wills**—Bequest.—Where a testator bequeathed to two sisters "all I am worth, amounting to four thousand three hundred dollars or thereabout, which is now in possession of S. as trustee," the will covered only such fund, and the words "all I am worth" do not give it application to after-acquired property.—Albert v. Safe Deposit & Trust Co. of Baltimore, Md., 103 Atl. 130.